

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMAR ANDRE BOVAN,

Plaintiff,

v.

RITA BRAZINGTON, MAGGIE
MILLER-STOUT, EARL X.
WRIGHT, DAN PACHOLKE,
THOMAS ORTH, MR. KLEMKE,
MR. LAWRENCE, MS. BURK, BOB
CAPES, MS. SIAZ, CC2 STOKES, CS
FITZPATRICK, RON FREDRICK,
CLARA CURL and OFFICER
ALEXANDER,

Defendants.

NO: 13-CV-0138 -TOR

ORDER DISMISSING FIRST
AMENDED COMPLAINT

BEFORE THE COURT is Plaintiff's First Amended Complaint (ECF No. 29). Plaintiff, a prisoner at the Monroe Correctional Complex-Minimum Security Unit, is proceeding *pro se* and *in forma pauperis*. Plaintiff seeks \$10 billion in

1 punitive damages and \$2 billion “for retaliation” at the Airway Heights Corrections
2 Center.

3 After reviewing the First Amended Complaint in the light most favorable to
4 Plaintiff, the Court finds that he has failed to state facts which “plausibly give rise
5 to an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). For the
6 reasons set forth below, the Court finds Plaintiff has failed to cure the deficiencies
7 of his initial complaint.

8 **GRIEVANCES**

9 Once again, Plaintiff appears to assert that Defendant Earl X. Wright, as the
10 Secretary of the Department of Corrections (“DOC”), and Defendant Dan
11 Pacholke, as Director of the DOC, failed to follow policy by not investigating
12 Plaintiff’s grievances further against Defendants Sgt. Orth and CC2 Brazington.
13 Plaintiff complains that his incoming legal mail was opened with “reckless
14 disregard of (DOC) policy and Plaintiff’s Constitutional Due Process rights.” He
15 also seems to allege these Defendants failed to protect Plaintiff from being
16 “assaulted” by Defendant Brazington. Plaintiff’s allegations are insufficient to
17 state a claim against these Defendants upon which relief may be granted.

18 Contrary to Plaintiff’s assertions, an inmate has no due process rights
19 regarding the proper handling of grievances as there is no protected liberty interest
20 in the prison grievance procedure. *See Mann v. Adams*, 855 F.2d 639, 640 (9th Cir.

1 1988) (concluding there is no legitimate claim of entitlement to a prison grievance
2 procedure); *see also Sandin v. Conner*, 515 U.S. 472, 484 (1995) (noting that state
3 created liberty interests "are generally limited to freedom from restraint"). The
4 failure of prison officials to respond to or process a particular grievance does not
5 violate the Constitution. *See Flick v. Alba*, 932 F.2d 728, 729 (8th Cir. 1991); *see*
6 *also Baltoski v. Pretorius*, 291 F.Supp.2d 807, 811 (N.D.Ind.2003) ("[t]he right to
7 petition the government for redress of grievances, however, does not guarantee a
8 favorable response, or indeed any response, from state officials").

9 Furthermore, the failure to comply with a stated prison policy is not a *per se*
10 violation of a clearly established constitutional right. *Davis v. Sherer*, 468 U.S.
11 183, 193-95 (1984). Plaintiff's allegations regarding the processing of grievances
12 against Defendants Maggie Miller-Stout, Earl X. Wright, Dan Pacholke, CPM
13 Klemke, Siaz, C.S. Fitzpatrick, Ron Fredrick and Clara Curl fail to state claims
14 upon which relief may be granted.

15 **LEGAL MAIL**

16 Plaintiff contends that on an unspecified date, Defendant Thomas Orth failed
17 to give Plaintiff his incoming legal mail unopened, in violation of DOC policy.
18 Rather, Plaintiff states Defendant Orth sent him a letter stating, "Your 'legal mail'
19 was inadvertently opened by one of my staff members and then once realized it
20 was legal mail, was processed accordingly. It was not scanned nor reviewed. I

1 apologize for the error but when dealing with over 1,000 pieces of mail for
2 offenders on a daily basis, human error does come into play. Your mail was not
3 readily identifiable and was processed through an automatic letter opener.”
4 Plaintiff complains Defendant Orth made a “false statement” because the envelope
5 indicated it was sent from a King County Prosecuting Attorney and was marked
6 “legal mail,” which Plaintiff asserts was then “crossed out with a red and black pen
7 by Sgt. Orth and or his mail room staff at AHCC.”

8 As previously advised, an inadvertent opening of an inmate's legal mail
9 constitutes mere negligence and does not rise to the level of a constitutional rights
10 violation cognizable under § 1983. *See Stevenson v. Koskey*, 877 F.2d 1435, 1441
11 (9th Cir. 1989). An isolated incident of mail interference or tampering usually
12 does not support a claim under § 1983 for the violation of a constitutional rights.
13 *See e.g. Davis v. Goord*, 320 F.3d 346, 351 (2d. Cir. 2003) (isolated incident of
14 mail tampering usually insufficient to state claim); *Gardner v. Howard*, 109 F.3d
15 427, 431 (8th Cir. 1997) (isolated incident of opening legal mail without evidence
16 of improper motive or resulting interference with access to courts or right to
17 counsel does not support a claim); *Smith v. Maschner*, 899 F.2d 940, 944 (10th Cir.
18 1990) (isolated incident of opening one piece of legal mail in error does not rise to
19 level of constitutional violation). Here, Plaintiff has presented no facts showing
20 Defendant Orth's actions interfered with his access to the courts or his right to

1 counsel. Therefore, Plaintiff has failed to state a claim against Defendant Orth
2 upon which relief may be granted.

3 **FAILURE TO PROTECT/EXCESSIVE FORCE**

4 Plaintiff contends that Defendants Wright, Pacholke, CPM Klemke, CC2
5 Lawrence, CC3 Burk and CC2 Stokes failed to protect Plaintiff from being
6 assaulted by Defendant CC2 Brazington, after Defendant CC2 Stokes allegedly
7 gave Plaintiff permission to knock on Defendant Brazington's door. Once again,
8 Plaintiff fails to present facts regarding this alleged assault.

9 It appears from Plaintiff's assertions against Defendant Capes, that Plaintiff
10 knocked on Defendant Brazington's door, despite the fact there was a posted sign
11 stating, "Do Not Knock." Defendant Brazington then apparently came out and
12 "took" Plaintiff's ID. The Court cannot infer, based on the facts presented in the
13 First Amended Complaint that Defendant Brazington engaged in the excessive use
14 of force. *See Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *Whitley v. Albers*, 475
15 U.S. 312, 322-23 (1986).

16 Similarly, the Court cannot infer that on an unspecified date Defendants
17 Wright, Pacholke, Klemke, Lawrence, Burk or Stokes failed to protect Plaintiff
18 from a substantial risk of serious harm. *See Wilson v. Seiter*, 501 U.S. 294 (1991);
19 *Farmer v. Brennan*, 511 U.S. 825, 840-847 (1994). Plaintiff's allegations are
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1 insufficient to state claims against Defendants Brazington, Klemke, Lawrence,
2 Burk, Miller-Stout, Wright, Pacholke, or Stokes upon which relief may be granted.

3 MISCELLANEOUS MAIL CLAIMS/RETALIATION

4 Plaintiff also seems to allege interference with his outgoing legal mail by
5 Defendants Lawrence and Burk. He does not state when this occurred or any of
6 the surrounding circumstances. To the extent Plaintiff may be attempting to state a
7 claim that he was denied access to the court, he has failed to do so.

8 To establish the denial of meaningful access to the courts, a plaintiff must
9 show that he suffered "actual injury" as a result of the defendants' actions. *See*
10 *Lewis v. Casey*, 518 U.S. 343, 351-52 (1996) (stating that an inmate bringing an
11 access to the courts claim must establish that he has suffered an "actual injury");
12 *Vandelft v. Moses*, 31 F.3d 794, 797 (9th Cir. 1994), *cert. denied*, 516 U.S. 825
13 (1995) (holding that an inmate must establish he has suffered an "actual injury"
14 where he alleges that he was denied reasonable access to the law library). Plaintiff
15 presents no facts showing he suffered actual injury to "contemplated or existing
16 litigation, such as the inability to meet a filing deadline or to present a claim."
17 *Lewis v. Casey*, 518 U.S. at 348. Plaintiff's allegations are insufficient to state a
18 claim against Defendants Lawrence and Burk.

19 To the extent Plaintiff asserted Defendant Lawrence's actions were
20 retaliatory, he failed to present any facts from which the Court could infer a

1 cognizable claim of retaliation. As previously advised, “[w]ithin the prison
2 context, a viable claim of First Amendment retaliation entails five basic elements:
3 (1) An assertion that a state actor took some adverse action against an inmate (2)
4 because of (3) that prisoner's protected conduct, and that such action (4) chilled the
5 inmate's exercise of his First Amendment rights, and (5) the action did not
6 reasonably advance a legitimate correctional goal,” *Rhodes v. Robinson*, 408 F.3d
7 559, 567–68 (9th Cir. 2005); *accord Watison v. Carter*, 668 F.3d 1108, 1114–15
8 (9th Cir. 2012); *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009),

9 Prisoners have a protected right to file prison grievances. *Watison*, 668 F.3d
10 at 1114; *Brodheim*, 584 F.3d at 1269. However, Plaintiff's amended complaint
11 presents no facts supporting a plausible claim that adverse action was taken against
12 him because of his engagement in conduct protected under the First Amendment.
13 Although Plaintiff has a right to file prison grievances, the bare assertion of
14 retaliatory motive does not suffice to support a claim. *Watison*, 668 F.3d at 1114;
15 *Brodheim*, 584 F.3d at 1269.

16 In addition, Plaintiff claims that on an unspecified date, Defendant Officer
17 Alexander knowingly gave Plaintiff's incoming regular mail to another inmate.
18 Although Plaintiff asserts this violated his Fourteenth Amendment due process
19 rights, he has failed to state how this incident on an unspecified date caused him
20 harm.

1 Deliberate mishandling of mail may violate a prisoner's First Amendment
2 and due process rights. However, a single mistake or occasional incident of
3 mishandling of mail does not state a claim under § 1983. *See Smith v. Maschner*,
4 899 F.2d 940, 944 (10th Cir. 1990); *Bach v. Illinois*, 504 F.2d 1100, 1102 (7th Cir.
5 1974) *cert. denied sub nom., Bensinger v. Bach*, 418 U.S. 910 (1974).
6 Additionally, a plaintiff must be able to show that he was injured by the denial of
7 access to mail. *See Morgan v. Montanye*, 516 F.2d 1367, 1371 (2nd Cir. 1975),
8 *reh'g denied*, 521 F.2d 693, *cert. denied*, 424 U.S. 973 (1976). Although granted
9 the opportunity to do so, Plaintiff has made no such showing. Plaintiff has failed
10 to state a claim against Defendant Alexander upon which relief may be granted.

11 **MENTAL HEALTH RESPONSE**

12 Plaintiff once more appears to be complaining of the response he received
13 from Defendant Bob Capes on August 23, 2013, to his request for medication to
14 help him sleep and to calm his "paranoidness." He claims Defendant Capes wrote:
15 "What I understand is that you knocked on 'do not knock.' She came out and 'took'
16 your ID and that is it and now you are claiming all of this?" and "'You once use to
17 beat people up' so you know about assault." This response is insufficient to show
18 a constitutional violation.

19 For an inmate to state a claim under § 1983 for medical mistreatment or
20 denial of medical care, the prisoner must allege "acts or omissions sufficiently

1 harmful to evidence deliberate indifference to serious medical needs." *Estelle v.*
2 *Gamble*, 429 U.S. 97, 106 (1976). Deliberate indifference exists when an official
3 knows of and disregards a serious medical condition and the official is "aware of
4 facts from which the inference could be drawn that a substantial risk of harm
5 exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825,
6 837 (1994). Moreover, "[b]ecause society does not expect that prisoners will have
7 unqualified access to health care, deliberate indifference to medical needs amounts
8 to an 8th Amendment violation only if those needs are 'serious.'" *Hudson v.*
9 *McMillian*, 503 U.S. 1, 9 (1992) (citing *Estelle*, 429 U.S. at 103-104).

10 Plaintiff has presented no facts from which the Court could infer Defendant
11 Capes was deliberately indifferent to his mental health needs. *See McGuckin v.*
12 *Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992), overruled on other grounds by *WMX*
13 *Technologies, Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997); *Hutchinson v. United*
14 *States*, 838 F.2d 390, 394 (9th Cir. 1988) ("Mere negligence in diagnosing or
15 treating a medical condition, without more, does not violate a prisoner's Eighth
16 Amendment rights."). The Court cannot infer from his responsive statements that
17 Defendant Capes either ignored or failed to respond to Plaintiff's mental health
18 needs. Plaintiff has failed to state a claim against Defendant Capes upon which
19 relief may be granted.

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DISMISSAL

Having granted Plaintiff the opportunity to amend his complaint to present a plausible claim for relief, and having granted Plaintiff a generous extension of time in which to do so, **IT IS ORDERED** the First Amended Complaint is **DISMISSED with prejudice** for failure to state a claim upon which relief may be granted. 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1).

Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who brings three or more civil actions or appeals which are dismissed as frivolous or for failure to state a claim will be precluded from bringing any other civil action or appeal *in forma pauperis* “unless the prisoner is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g). **Plaintiff is advised to read the new statutory provisions under 28 U.S.C. § 1915. This dismissal of Plaintiff’s complaint may count as one of the three dismissals allowed by 28 U.S.C. § 1915(g) and may adversely affect his ability to file future claims.**

Pursuant to 28 U.S.C. § 1915(a)(3), “[a]n appeal may not be *taken in forma pauperis* if the trial court certifies in writing that it is not taken in good faith.” The good faith standard is an objective one, and good faith is demonstrated when an individual “seeks appellate review of any issue not frivolous.” *See Coppedge v.*

1 *United States*, 369 U.S. 438, 445 (1962). For purposes of 28 U.S.C. § 1915, an
2 appeal is frivolous if it lacks any arguable basis in law or fact. *Neitzke v. Williams*,
3 490 U.S. 319, 325 (1989).

4 **Accordingly, IT IS HEREBY ORDERED:**

- 5 1. The District Court Executive is directed to enter this Order, enter Judgment,
6 forward copies to Plaintiff at his last known address, and **CLOSE** the file.
- 7 2. The District Court Executive is further directed to forward a copy of this
8 Order to the Office of the Attorney General of Washington, Criminal Justice
9 Division.
- 10 3. The Court finds that any appeal of this Order would not be taken in good
11 faith and would lack any arguable basis in law or fact. Accordingly, the
12 Court hereby revokes Plaintiff's *in forma pauperis* status.

13 **DATED** November 1, 2013.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
United States District Judge